[illegible] United States

October Term, [illegible]

STATE OF [illegible], ET. AL.,
Petitioners,

v.

STATE OF OKLAHOMA, ET. AL.,
Respondents.

[illegible] PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, ET. AL.,
Respondents.

[illegible] TO THE UNITED STATES COURT
[illegible] FOR THE TENTH CIRCUIT

[illegible] Oklahoma Wildlife Federation.

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Questions Presented.

I. Whether the Clean Water Act (the Act), as further embodied in federally-approved water quality standards and EPA's own regulatory provisions and interpretations, prohibits the permitting of new discharges to protected waters on the basis of a "no detectable impact" standard.

II. Whether the Tenth Circuit exercised the proper scope of judicial review over EPA's permit issuance when the issuance was based on a construction of the Clean Water Act and federally-approved water quality standards that is contrary to clear congressional intent.

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MISCELLANEOUS.

No. 90-1262 and 90-1266

In the

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, ET. AL.,
PETITIONERS,

v.

STATE OF OKLAHOMA, ET. AL.,
RESPONDENTS.

ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER,

v.

STATE OF OKLAHOMA, ET. AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief for the Oklahoma Wildlife Federation.

Introductory Statement.

The Oklahoma Wildlife Federation ("OWF"), a party to the proceeding in the court of appeals and an affiliate of the National Wildlife Federation ("NWF"), is an organization dedicated to the protection of Oklahoma wildlife and the restora-

tion, preservation and protection of the natural resources that support that wildlife, including Oklahoma's rivers, lakes and streams. As an affiliate of the National Wildlife Federation, its interest in the protection of Oklahoma's wildlife and natural resources is consistent with, and a part of, an interest in protecting, restoring and preserving wildlife, and natural resources, nationwide.

As an environmental organization in Oklahoma, OWF naturally has an interest in the protection of Oklahoma's waters, including those "intra" state portions of the Illinois River at issue here. But, OWF recognizes that its goal and Oklahoma's goal in preserving and protecting the waters of Oklahoma is also an integral part of a goal to improve and preserve the quality of intra and interstate waters, nationwide, a goal also set forth expressly by Congress in the Clean Water Act. To serve this goal, the federally-approved water quality standards of Oklahoma, as will be further demonstrated below, were adopted as and are a part of a national scheme to improve the quality of all United States' waters by preventing the addition of pollutants to those waters by *any* source in *any* state.

Summary of Arugment.

This case is readily resolved by a reading of the plain language of the Clean Water Act and the plain language of federally-approved Oklahoma water quality standards.[1] The Clean

[1] The Clean Water Act will be referred to as the "Clean Water Act" or "the Act". The Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, Pub. Law. No. 95-217, 91 Stat. 1566 (1977) is the "Clean Water Act" or "Act" to which OWF refers. All citations to the Act are to Title 33 of the 1984 United States Code Codification. For the sake of clarity and consistency, references will be to codified sections rather than to the sections as passed by Congress. For the sake of brevity, OWF does not specifically reference each relevant section or definition of the Act, but instead incorporates the references and explanations of those sections and definitions set forth in the State of Oklahoma's brief.

Water Act is expressly premised on a total prohibition of *any* discharge of pollutants to all navigable waters, except under the exclusive and carefully defined permitting sections of the Act's "National Pollution Elimination Discharge System." 33 U.S.C. §§ 1311(a), 1342. *See also, United States* v. *Earth Sciences*, 599 F.2d 368 (10th Cir. 1979); *Natural Resources Defense Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (emphasis added). The federally-approved Oklahoma water quality standards unambiguously prohibit any new discharges and any degradation to protected waters such as the Illinois River. Oklahoma Water Quality Standards §§ 3 and 5 (J.A. at 28 and 46).

Neither the Clean Water Act's exclusive permitting section (which by its title alone focuses on "national pollutant discharge *elimination*"), nor the federally-approved water quality standards provide any basis for the use of an "no detectable impact" standard to create an exception to both the Act's and standards' express prohibitions against the addition of pollutant discharges to the nation's waters. Rather, in enacting the Clean Water Act, specifically through its 1972 (and 1977) amendments, it was Congress' clear intent to *reject* the use of indefinite standards which had focused on measurements of the "tolerable effects" (or "detectable impact") of water pollution, and which, in prior water pollution acts, had proven "ineffective" in solving the nation's water pollution problems. 33 U.S.C. § 1342, *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202 (1976) (emphasis added). In its amendments to the prior acts, Congress instead shifted its focus to the "preventable causes", of pollution (i.e. point sources) and the elimination of additional pollutant discharges from those sources. *Id*. There is no better evidence of this shift in focus by Congress then that which is found in the plain language of the Clean Water Act and Oklahoma's federally-approved water quality standards.

It is both alarming and remarkable that EPA chose to ignore such plain and unambiguous mandates against the addition of pollutants to the protected waters of the Illinois River by issuing Fayetteville a permit to discharge its wastes into those waters. It is even more remarkable and alarming that EPA did so in complete contradiction to its own longstanding interpretations of its model antidegradation provision (on which Oklahoma's standard is based), in which EPA had correctly concluded that the plain meaning of an antidegradation standard as applied to protected, "outstanding natural resource waters" is "*no* degradation", and *no* allowance of new point source discharges (through a permit issuance), to those waters. Memorandum, James A. Rogers, Associate General Counsel, Water and Solid Waste Division to Kenneth M. MacKenthun, Director, Criteria & Standards Division (Aug. 15, 1979). Here, ignoring its own plain meaning interpretation, EPA mistakenly *allowed* new discharges into the protected waters of the Illinois River which it itself had previously determined were unambiguously *prohibited*.

Moreover, in place of the plain language of both the Clean Water Act and the federally-approved Oklahoma standards, EPA proposes a dangerous and imprecise standard through which it seeks to create an exception where none exists, a standard which provides that new discharges to protected waters are permissible so long as they do not have an individual "detectable impact on the current water quality." (EPA Br. at 22.) The unavoidable consequences of adopting this standard are alarming; any potential discharger of pollutants to protected (or other) waters would be *allowed* to discharge so long as as it could show that its individual discharges were not "detectable." This is a policy "absurdity", which could not be further from Congress' unambiguous intent to *eliminate* the discharge of pollutants to the nation's waters. 33 U.S.C. §§ 1251, 1311(a).

Yet, once again remarkably, EPA argues for deference for its interpretation (EPA Br. at 15, 30-33). EPA's construction of the Clean Water Act and Oklahoma's federally-approved water quality standards, a construction which incorrectly permitted new pollutant discharges to a protected water body on the basis of an inappropriate and prohibited standard, could not be more contrary to Congress' clear intent in enacting the Clean Water Act. EPA is entitled to no deference for this construction. Rather, in reversing the EPA's NPDES permit issuance, the Tenth Circuit simply did what it was required to do (and what EPA failed to do, but *should* have done), it gave effect to the "unambiguously expressed intent of Congress." *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

Argument.

I. The Clean Water Act, Oklahoma's Federally-Approved Water Quality Standards, and EPA's Own Regulatory Provisions and Interpretations, Prohibit the Permitting of New Discharges to Protected Waters on the Basis of a "No Detectable Impact" Standard.

The Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.*, is premised on a prohibition of *any* discharge of pollutants to navigable waters, except as authorized by the exclusive and carefully-defined permitting sections of the Act. 33 U.S.C. §§ 1311(a), 1342. *See also, Earth Sciences*; *Costle* (emphasis added). It is the goal of the Act to "restore and maintain the chemical, physical, and biological integrity of the nation's waters", and to that end, that "the discharge of pollutants into navigable waters be *eliminated* by 1985." 33 U.S.C. § 1251 (emphasis added).

The only means by which a point source discharger can escape the total prohibition of § 1311(a) is to apply for and obtain a permit specifically authorizing the discharges under the Act's "National Pollution Elimination Discharge System" (NPDES). 33 U.S.C. §§ 1311(a), 1342, *Earth Sciences*; *Costle*.[2]

This case involves the issuance of a permit by EPA to the city of Fayetteville, Arkansas for a municipal wastewater treatment plant which proposed to discharge treated wastewater into both the White River in Arkansas, and the Illinois River, an Arkansas-Oklahoma interstate stream.[3] By virtue of the Clean Water Act's plain language, Fayetteville's proposed discharge of pollutants into the navigable waters of the White and Illinois Rivers was presumptively prohibited. 33 U.S.C. § 1311(a). The exclusive means through which Fayetteville could possibly avoid this prohibition was through seeking, which it did, a permit under the Act's NPDES program." 33 U.S.C. §§ 1311, 1342.

In addition (and as EPA itself correctly concluded), the issuance of a permit to Fayetteville for its potential "pollutant discharges" also depended on compliance with the federally-approved water quality standards of Oklahoma for the Illinois

[2] The plain language of the Act's permitting section, the "National *Pollutant Discharge Elimination* System" explicitly reflects the primary purpose of that section to scrutinize proposed discharges through the permit application process, the ultimate goal being "pollutant discharge *elimination*." 33 U.S.C. § 1342, *see also*, *Menzel* v. *County Utilities*, 712 F.2d 91, 95 (4th Cir. 1983) (emphasis added). Further, permits only *may* be granted if the discharge at issue will meet all applicable requirements under the Act; there is no *requirement* to issue a permit. 33 U.S.C. § 1342(a)(1) (emphasis added).

[3] The White River and the Illinois River are "navigable waters" under the Act. The Fayetteville wastewater treatment plant is a "point source" under the Act which sought to discharge pollutants into navigable waters, specifically the White River and the Illinois River.

River, a designated "scenic river" into which Fayetteville, in part, sought to discharge its wastes. Those standards prohibit "*any* new point source discharge of wastes. . ." into "scenic rivers" (such as the Illinois River) and "*no* degradation" of high quality waters, including "scenic rivers". Oklahoma Water Quality Standards §§ 3, 5 (1982) (J.A. at 28, 46) (emphasis added).[4]

Despite the plain language of both the Clean Water Act and the federally-approved standards, EPA issued the permit. It did so based on a standard which provided that the permit issuance was appropriate if Fayetteville's proposed pollutant discharges would not cause an "actual detectable" or "measurable" violation of Oklahoma's federally-approved water quality standards.

The central issue in this case is whether EPA's issuance of the permit was in accordance with the Clean Water Act and the federally-approved standards. For the reasons stated below, it clearly was not.

A. *Congress' Clear Intent In Enacting The 1972 Federal Water Pollution Control Act Amendments, And The 1977 Clean Water Act Amendments, Was To Reject The Use Of Standards Based On Measurements Of The "Tolerable Effects" Or "Detectable Impact" Of Water Pollution.*

"The first principle of (the Clean Water Act) is . . . that it is unlawful to pollute at all. . . The foremost national goal

[4] Again, for the sake of brevity, OWF incorporates into its brief those arguments made by the State of Oklahoma that the plain language and meaning of the Clean Water Act requires a state to comply with *all* Clean Water Act standards, including those state standards incorporated into the Act through federal approval. Once federally-approved, the water quality standards of a particular state as to its navigable waters, intra or interstate, are standards that must be complied with by any other state that contains a "point source" which seeks to discharge pollutants into the "navigable waters" of the particular state. OWF points out that, although the standards at issue here are those of a "downstream" state in relation to a discharger located in an "upstream" state, some of the nation's most significant water bodies (i.e. the Great Lakes) demonstrate situations where the waters of one state affect the waters of another state without being in a "downstream/upstream" location to each other.

enunciated by Congress is the complete elimination of the discharge of pollutants." *Natural Resources Defense Council* v. *EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). As this Court has stated:

> Congress's intent in enacting (the Act) was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharge to an administrative apparatus established by Congress to achieve its goals. The major purpose of (the Act) was to establish a *comprehensive* long-range policy for the elimination of water pollution.

Milwaukee v. *Illinois*, 451 U.S. 304, 318 (1981), *citing, in part*, S. Rep. No. 92-414 at 95, 2 Leg. His. 1511 (emphasis by court in original).[5] The Act's sponsors "successfully insisted on a *zero-discharge-of-pollutants* goal despite strong objection from both within and without." *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156, 179-80 (D.C. Cir. 1982) (emphasis added).

In amending the 1948 and other prior Acts, Congress engaged in a "total restructuring" and "complete rewriting" of existing water pollution legislation. *Milwaukee* at 317-18, *citing* 1 Leg. Hist. 350-351 (remarks of Chairman Blatnik of the House version of the Amendments); *id.*, at 359-360 (remarks of Rep. Jones, S. Rep. No. 92-414, p. 95 (1971), 2 Leg. Hist. 1511; *id.*, at 1271 (remarks of Chairman Randolph of the Senate Committee which drafted the Senate version of the amendments), and *State Water Resources* at 202.

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[5] The court's reference is actually to "the Amendments" of 1972. As stated *supra*, 2n, The Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, Pub. Law No. 95-217, 91 Stat. 1566 (1977) is the "Act" to which OWF refers.

In its "total restructuring" of the Act, through both its 1972 (and 1977) amendments, Congress purposefully decided to alter the earlier Acts' exclusive reliance on water quality standards which had proven ineffective and which had focused on "*the tolerable effects* rather than the *preventable causes of water pollution*. . ." *State Water Resources* at 202 (emphasis added). Rather, the amendments aim at achieving maximum "effluent limitations" on "point sources." Water quality standards are used as "a supplementary basis for effluent limitations . . . so that . . . point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Id.* at 204-5. *See also*, S. Rep. No. 370 at 42, 95th Cong. 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Admin. News (4326).

Particularly through the NPDES program, the focus of the Act, as amended, shifted from one which *had* looked at "tolerable effects" of water *pollution* to one which now looks at the "preventable causes" of the pollution, i.e. the "point source" of "*pollutant discharges*". Rather than relying on measurements of the "tolerable effects" (or "detectable impact") of discharges being made, the amended Act seeks to prevent any new "pollutant discharges" by a "preventable cause" of pollution, namely a "point source." *Id.*, *Also see*, 33 U.S.C. § 1311(a).[6]

Because it had *proven ineffective*, Congress expressed clear intent in its enactment of the 1972 and 1977 amendments to reject a "tolerable effects" ("no detectable impact") standard as a standard for solving the nation's water pollution problems.

[6] As demonstrated *infra*, pp. 11-15, Oklahoma's federally-approved water quality standards, in accordance with the amended Act's shift in focus, also emphasize preventing source activity through the application of antidegradation standards for protected waters, i.e. by expressly prohibiting *any* new point sources discharge into those waters. Moreover, EPA's own prior interpretation of its model antidegradation provision concluded that a focus on arguments over a measurement of "x or y micrograms" (i.e., the tolerable effects" or "detectable impact" of water pollution) is "irrelevant" and inappropriate when evaluating whether a permit should be issued to allow discharges to protected waters. See *infra*, pp. 12-13.

Yet, it is just such an ineffective "tolerable effects" or "de minimis" standard that EPA resurrected here in its "no detectable impact" approach to the discharges from the Fayetteville Plant. EPA determined that, if the adverse "effects" of Fayetteville's discharges to the Illinois River could not be definitely demonstrated, then they were effects that were "tolerable", and allowable, in a NPDES permit. In creating this indefinite standard, EPA mistakenly relied on a pre-1972 standard that Congress had so unambiguously altered in its Amendments.[7]

[7] In enforcement actions under the Act against dischargers who have violated the terms of their permits, courts have continually reiterated what Congress so clearly intended; namely there is "no de minimis" standard under the Act and no need for a showing of actual injury for a penalty to be enforced. *Sierra Club* v. *Union Oil*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 108 S.Ct. 1102 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988). ("The Clean Water Act and the regulations promulgated under it make no provision for "rare violations"); *See also, Chevron USA* v. *Yost*, 919 F.2d 27 (5th Cir. 1990) (discharging foreign substance violates the Clean Water Act without a showing of actual injury); *PIRG* v. *Powell Duffryn Terminals*, 720 F.Supp. 1158, 1167 (D.N.J. 1989) (court rejected defendant's contention that no penalty is appropriate absent an adverse impact on the river into which it had discharged pollutants); *PIRG of New Jersey* v. *C.P. Chemicals*, 26 ERC (BNA) 2017, 2021 (D.N.J. 1987) (to reduce penalties due to a limited or *undetectable* impact would result in a situation where "any permittee could ignore (its permit requirements) . . . as long as it discharged into already heavily polluted waters") (emphasis added); *Also see, generally, Student PIRG of New Jersey* v. *Georgia Pacific*, 615 F. Supp. 1419, 1424 (D.N.J. 1985).

Further, EPA itself, in a notably contrary position to that which it has taken here, in arguing for the imposition of penalties on violators of the Act, has directly stated that a "de minimis" standard is unworkable. *EPA Civil Penalty Policy* at 10 (July 8, 1980) ("all pollutants introduced into the environment create some harm or risk, . . . and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question.").

Moreover, in light of Congress' "establishment of such a self-consciously comprehensive program" in enacting the Act, Congress, no doubt, would have included a "de minimis" or "no detectable impact" exception had it wanted to. In contrast, Congress did plainly state such an exception in enacting the Clean Air Act which prohibits only "significant deteriorations" of air quality in "clean air areas", with "significant" quantified in terms of maximum allowable increases in pollutant concentrations. 42 U.S.C. §§ 7471-7473. This is not to say that Congress was "silent" here. Section 1311(a) alone, in its prohibition against pollutant discharges, manifests Congress' voice and intent. 33 U.S.C. §1311(a).

B. *Oklahoma's Federally-Approved Water Quality Standards, And EPA's Own Interpretations Of Its Antidegradation Provision, Unambiguously Prohibit The Permitting Of New Discharges To Protected Waters On The Basis Of A "No Detectable Impact" Standard.*

Under § 5 of Oklahoma's federally-approved water quality standards, the Illinois River has been designated as a "scenic river". "Scenic rivers" (also under § 5) are protected by a prohibition of *any* new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3." Oklahoma Water Quality Standards § 5 (1982) (J.A. at 46) (emphasis added). Section 3 sets forth the standards' "Antidegradation" Policy. Oklahoma Water Quality Standards § 3 (J.A. at 28). Although the antidegradation policy expressly provides for "lower water quality as a result of necessary and justifiable economic or social development" in certain instances, it unequivocally provides that "no degradation shall be allowed in high quality waters which constitute an outstanding resource, or in waters of exceptional recreational or ecological significance. These include water bodies . . . designated (as) 'scenic rivers' ". *Id.* (emphasis added). Section 3 clearly makes no exception to Section 5's otherwise absolute prohibition of *any* new point source discharge of wastes, and thus unambiguously prohibits *any* new pollutant discharge of wastes into the Illinois River. Further § 3 expressly prohibits any degradation to the subject "scenic river". The standards could not be any more simple or clear; *no* new point source discharge and *no* degradation is allowed to scenic rivers, which include the interstate Illinois River.

Moreover, as EPA itself points out, the antidegradation policy of the Oklahoma water quality standards is virtually identical to EPA's own model antidegradation standard in effect

at the time (EPA Br. at 22-23).[5] EPA further states that, because of this replication, in considering the Fayetteville permit application, it interpreted Oklahoma's standard as identical to the federal model (EPA Br. at 23). EPA then maintains, though, that "there has been no national rulemaking or determination on how to interpret and apply the terms of the (model antidegradation) standard", and that it has not attempted to prescribe "what constitutes a 'lowering' of water quality" in an ONRW under an antidegradation standard (EPA Br. at 23-24).

But, despite EPA's statements to the contrary in its brief, EPA *has*, on more than one occasion, evaluated its antidegradation standard and its application to ONRWS. In a 1979 Office of the General Counsel legal opinion, EPA evaluated whether, under the Clean Water Act, EPA may designate particular waters as ONRWS where states fail to do so, and further evaluated whether it may promulgate water quality standards to protect state-designated ONRWS. Memorandum from James A. Rogers, Associate General Counsel, Water and Solid Waste Division to Kenneth M. MacKenthun, Director, Criteria and Standards Division (Aug. 15, 1979). In answering question 2, EPA concluded as follows:

> Assuming a State has adopted an ONRW, you ask if EPA has authority to promulgate a water quality standard to protect the ONRW's status. We are not sure why *any* water quality standard would be neces-

[5] EPA's standard is termed a Tier III antidegradation standard and the waters protected by it are known as "outstanding national resource waters" or ONRW. The standard in effect at the time provided in pertinent part, that "*no degradation shall be allowed* in high quality waters which constitute an outstanding National resource, such as waters . . . of exceptional recreational or ecological significance." 40 C.F.R. 35.1550(e)(2) (1981) (later amended to current regulation, 40 C.F.R. 131.12(a)(3)) (EPA Br. at 22-23) (emphasis added).

> for an ONRW, since the standard is *no* degradation; it would seem that arguments over *x* or *y* micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under § 301(b)(1)(C), which requires compliance with all state laws.

Id. at 4 (emphasis in original). In a footnote to its statement that the standard is *no* degradation, EPA points out that the standard is "unlike the Clean Air Act concept which is no significant deterioration." *Id.*[9]

EPA conveniently omits any mention of this longstanding legal opinion that clearly highlights the inconsistency of EPA's flawed interpretation of Oklahoma's federally-approved standards here. As EPA itself stated, the antidegradation standard for an ONRW (such as the Illinois River) is *no* degradation." Memorandum, James A. Rogers (Aug. 15, 1979) at 4. The very "arguments over *x* or *y* micrograms per cubic meter" that EPA engaged in here in setting forth its "no detectable impact" standard, are "irrelevant." *Id.* Most importantly, EPA's prior

[9] In 1989, *Catherine A. Winer* (listed as an attorney for EPA on the Solicitor General's Brief in the case currently before the Court) reviewed the 1979 legal opinion in light of 1983 Water Quality Standards rulemaking which referred to the antidegradation policy. Ms. Winer's review did *not* alter the 1979 opinion, except to state that the preamble to the 1983 regulations discussed the "no degradation" requirement for ONRWS and "explained that EPA was modifying it slightly to allow minor, short-term impacts which did not interfere with the character of the ONRW," in part because States were being deterred by the strictness of the no degradation policy from designating ONRWS. Memorandum from Catherine A. Winer, Attorney, Water Division, to William Diamond, Director of Criteria and Standards Division (May 8, 1989). EPA explicitly admits in its brief that the 1983 change in its regulation "did *not* affect the restrictions for long-term sources of pollutants". Rather the change was only to allow for temporary degradation associated with construction projects (EPA Br. at 23, citing to 48 Fed. Reg. 51, 402-51, 403 (1983) (emphasis added).

interpretation, in direct contradiction to its interpretation here, expressly states that "*whenever* a point source applied for a permit to discharge into an ONRW (i.e. as Fayetteville did), (we could) *simply deny the permit*." *Id.* (emphasis added).

EPA *again* recognized the plain meaning of "no degradation" as recently as June, 1991 in an EPA newsletter. There, Mr. William Diamond (to whom Ms. Winer had addressed her 1989 memorandum) stated that "Oklahoma currently maintains a strict antidegradation policy. . . . Requirements for Tier 3 Waters, ONRW's, are implemented by allowing *no new point source discharge and no increased loading and concentration in existing permits*." Diamond, William R. Director, Standards & Applied Sciences Division, *Newsletter: Water Quality Criteria & Standards At 5* (June 1991) (emphasis added). It is remarkable that EPA (at the very same time it was drafting its brief in this case) could recite the very water quality standards at issue here correctly in its own newsletter, but offer a completely different interpretation for the purposes of this litigation.

It is undisputed that the permit at issue here would result in "pollutant discharges" into the Illinois River in Oklahoma from a new point source.[10] EPA's decision to employ a standard to *allow* these discharges on the basis that they would not have a "detectable" or "measurable" impact on the protected waters of the Illinois River is contrary to the Clean Water Act's explicit goal to *eliminate* the discharge of pollutants into the nation's waters. 33 U.S.C. §§ 1251(a), 1311(a) (emphasis added). EPA's decision further contravenes Congress' unambiguous intent, in enacting the Act, to reject "inefficient" standards premised on measurements of the "tolerable effects" (or "detectable impact") of water pollution, and to adopt clearer,

[10] For example, the ALJ estimated that 6 pounds of phosphorous alone would reach the Oklahoma boarder daily based on Fayetteville's daily maximum allowable discharge of 3.5 million gallons of effluents. Ark. Pet App. 129a.

more efficient standards focused on point source activity and the prevention of additional discharges from those point sources. See, *id.* and *State Water Resources* at 202.

Oklahoma's federally-approved water quality standards embody Congress' intent by explicitly prohibiting *any* new point source discharge into protected waters (ONRWS), such as the Illinois River. Oklahoma Water Quality Standards §§ 3 and 5 (J.A. at 28, 46). EPA's decision to ignore the plain language of both the Act and these standards and allow Fayetteville's discharges on the basis of an "inefficient" and indefinite standard, is both remarkable and alarming. The decision is even more remarkable and alarming in that it completely contradicts EPA's own longstanding interpretation of its antidegradation provision where EPA *had* correctly concluded that, "*whenever* a point source applied to a permit discharge into an ONRW, (we could) *simply deny the permit*." *Id.* (emphasis added).

Moreover, the unavoidable result of replacing the Act's and standards' plain language with EPA's proposed indefinite standard, a standard under which individual new discharges to protected waters would be permissible so long as they would have no "detectable impact on the current water quality", is simply dangerous (EPA Br. at 22). Use of this indefinite standard would result in an allowance of *any* pollutant discharges to protected (or other) waters so long as a potential discharger could show that its individual discharges had no "measurable" impact. As stated by the Tenth Circuit, such a policy is an "absurdity" which completely contravenes the explicit language and purpose of the Act to *eliminate* discharges 33 U.S.C. § 1251(a)(1); (Op. Below, 908 F.2d 595, 632), (emphasis added)."

"The Tenth Circuit focused its conclusion on the "absurdity" of EPA's use of a "no detectable impact" standard on the fact that the Illinois River was an already polluted body of water. Its ultimate holding was that "where water quality standards violations are already occurring in the receiving waters, no additional point source

II. The Tenth Circuit Exercised Proper Judicial Review Over EPA's Permit Issuance in that EPA's Construction of the Clean Water Act and the Federally-Approved Water Quality Standards Was Contrary to Clear Congressional Intent.

In a review of an agency's construction of a statute it administers, a court is faced with two questions. First, the court must evaluate whether "Congress has directly spoken to the precise question at issue." *Chevron* at 842. If Congress's intent is clear, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." The judiciary is the final authority on issues of statutory construction and *must* reject administrative constructions which are *contrary* to *clear congressional intent*." *Id.* at 843, citing cases (citations omitted, emphasis added). If, however, the statute at issue is "silent or ambiguous with respect to the precise issue", the question for the court is whether the Agency's construction of the statute was "permissible". *Id.*[12]

discharge to those waters may be permitted if it would contribute to the conditions that produce the violations". (Op. Below, 908 F.2d at 634). While this case does not present the issue, use of a "no detectable impact" standard would be equally "absurd" and prohibited, for many of the reasons stated herein, if applied to waters that did not have pre-existing violations of water quality standards.

[12] In reviewing EPA's permit issuance under the Administrative Procedure Act and appropriate case law, the Tenth Circuit conducted a comprehensive review of the Clean Water Act, the Oklahoma federally-approved water quality standards, and Congress' intent in enacting the Act. (See, Op. Below, 908 F.2d 595, throughout, but in particular at 597-599, 602-607, 609-620 and 630-34). The court, though, also reviewed the background and record of EPA's decision to determine whether EPA's interpretation of the Act was "reasonable". While we agree with the Tenth Circuit's conclusion that EPA's permit issuance was "arbitrary and capricious" and "otherwise not in accordance with law", it is OWF's position that it was not necessary for the court to have reached a "reasonable" or "permissible" analysis of EPA's decision. This is so in that the intent of Congress and the plain language of the Act, along with the plain language of the federally-approved standards, are clear on the precise question at issue; namely, they unambiguously prohibit the issuance of a permit to allow discharges into protected waters on the basis of a

As reiterated throughout, the intent of Congress, as expressed in the plain statutory language of the Act and the Act's legislative history, is clear. Congress unambiguously created a statute to "restore and maintain" the nation's waters, and proclaimed a goal that "the discharge of pollutants into navigable waters be eliminated" 33 U.S.C. § 1251(a). To effectuate this goal, it was clearly Congress' intent in amending the nation's prior water pollution acts to shift the focus from the prior acts' standards and provisions which had emphasized "the (tolerable) effects" of water *pollution* to a system that now unequivocally focuses on eliminating new *pollutant discharges* by "preventable causes (i.e. "point sources" such as Fayetteville). See, 33 U.S.C. §§ 1251, 1311, 1342, *State Water Resources* at 202, 204-5. Oklahoma's federally-approved standards and EPA's own longstanding interpretation of its antidegradation regulation clearly support Congress' intent.

As it had to do (and as the Tenth Circuit in reaffirming EPA's decision had to do), EPA correctly interpreted the plain language of the Act to determine that the federally-approved water quality standards of Oklahoma were applicable to Arkansas' proposed discharges. On this issue *alone*, EPA properly gave effect to the "unambiguously expressed intent of Congress." *Chevron* at 843.

Unfortunately, EPA then diverged from its plain meaning interpretation, and erroneously issued a NPDES permit on the basis of a "no detectable impact" standard, in a decision which unequivocally contravenes the plain language of the Clean Water Act, Congress' unambiguously expressed intent in

"no detectable impact" standard. *Chevron* at 842. If, though, this Court were to determine that "ambiguity" does exist in the statutory language of the Act and in Congress' intent, the record, as evaluated by the Tenth Circuit, conclusively supports a determination that the agency's construction was both impermissible and "arbitrary and capricious".

enacting the Act, and the plain language of the federally-approved water quality standards which EPA had just correctly determined it had to apply. In issuing the permit, it contradicted itself and its own longstanding explicit statements that the plain meaning of an antidegradation standard with respect to protected waters, is "*no* degradation" and *no* allowance of new point source discharges. EPA is simply not entitled to deference for a construction which so clearly contravenes clear Congressional intent, an intent which EPA itself had previously acknowledged in its own interpretations of its model antidegradation regulation, but here chose to ignore. *Chevron* at 842-43. Rather, EPA's blatantly inconsistent construction *reduces* any deference to which it might have otherwise been entitled. *INS* v. *Cardoza-Fonesca*, 480 U.S. 421, 446 (1986); *Motor Vehicle Mfrs.* v. *State Farm Mutual*, 463 U.S. 29, 47-48 (1983); *Environmental Defense Fund* v. *Chicago*, 727 F. Supp. 419, 424 (N.D.Ill. 1989) (emphasis added).

As such, the Tenth Circuit court, as the "final authority on issues of statutory construction" did what it was required to do; it rejected EPA's erroneous construction of the Act and the federally-approved standards, a construction which allowed a NPDES permit to be granted on the basis of a dangerous and "absurd" standard, and instead gave effect to the "unambiguously expressed intent of Congress". *Chevron* at 843. This Court, and numerous other courts, as they have been required to do, have summarily rejected such blatantly dangerous and contrary agency constructions.[13] This Court should uphold the Tenth Circuit's decision and do so here.

[13] For those cases in which this court and other courts have rejected such constructions, see *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26 (1990); *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158 (1989); *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988); *Cardoza-Fonseca*, 480 U.S. 421; *Board of Governors of the Federal Reserve Sys.* v. *Dimension Financial Corp.*, 474 U.S. 361 (1986); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261,

Conclusion.

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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272 (1968); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946); *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster* v. *Luther*, 163 U.S. 331, 342 (1896); *Fertilizer Institute* v. *EPA*, 1991 W.L. 96474 (D.C. Cir. 1991) (EPA construction of term "release" under CERCLA is impermissible because it contravenes plain meaning of statute); *Natural Resources Defense Council* v. *EPA*, 915 F.2d 1314 (9th Cir. 1990) (EPA not accorded deference for its restrictive construction of 304(1) (33 U.S.C. 1314(1) of the Clean Water Act in its regulations, in that the regulations were not in accordance with clear statutory provisions); *Abramovitz* v. *EPA*, 832 F. 2d 1071 (9th Cir. 1987) (EPA exceeded its authority by deferring action indefinitely, contrary to an explicit deadline in the Clean Water Act); *American Mining Congress* v. *EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (EPA's construction of the term "discarded material" under RCRA contravenes clear interest of Congress); *Natural Resources Defense Council* v. *EPA*, 863 F.2d 1420 (9th Cir. 1988) (struck down EPA's alternative limitation provision that creates possibility of incalculable toxic discharges without regard to degradation of marine environment as an "exception that threatens to swallow the rule" and as arbitrary, capricious, and contrary to the letter and spirit of the Clean Water Act); *Natural Resources Defense Council* v. *EPA*, 790 F.2d 289 (3rd. Cir. 1986) (EPA's definition, in its regulations, of phrase "consistent publically owned treatment works removal" violates Clean Water Act).